

No. 18143

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAMA COMPANY, a corporation,

Appellant,

vs.

UNION BANK, *et al.*,

Appellees.

Brief of Appellee—William N. Bowie, Jr., Trustee
in Bankruptcy of the Estate of Charles A.
Crowl.

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QUITTNER, STUTMAN & TREISTER,

639 South Spring Street,
Los Angeles 14, California,

*Attorneys for Appellee-Trustee
in Bankruptcy.*

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Jurisdiction.

The Court has jurisdiction of this appeal under Section 24 of the Bankruptcy Act, 11 U. S. C. Sec. 47.

Questions Presented.

1. Did the Referee in Bankruptcy err in finding that the reasonable rental value of appellant's premises for which appellee-Trustee in Bankruptcy was liable was the sum of \$806?

2. Did the Referee in Bankruptcy err in concluding that the bankruptcy court lacked summary jurisdiction to award an *in personam* judgment in favor of appellant and against appellee-Union Bank for the reasonable rental value of appellant's premises occupied by the Bank?

ARGUMENT.

1. **There Was No Error in the Referee's Determination of the Amount of Administrative Rent for Which Appellee-Trustee in Bankruptcy Was Liable.**

Appellee-Union Bank was the holder of an encumbrance on a major part of the bankrupt's machinery and equipment. Prior to bankruptcy, when it became apparent that the business could not continue, the Bank and the bankrupt had arranged for a joint auction of the encumbered and the unencumbered property. Bankruptcy occurred before the sale. Appellee-Trustee in Bankruptcy, determining that there was no equity in the machinery and equipment over the encumbrance, abandoned these assets and assented to the joint auction theretofore arranged.

The bankrupt's premises were vacated and returned to appellant-landlord on August 24, 1961 at the conclusion of the liquidation sale. It is common ground that the Trustee is liable to appellant only for the reasonable rental value of the premises occupied by the estate during the period June 1, 1961 to August 24, 1961.

The Referee in Bankruptcy found in effect that each of the appellees occupied a portion of the subject premises solely for storage purposes during that period. Since the property of the Bank located upon the premises amounted to approximately two-thirds in value and in physical bulk of the total of the personal

property stored there, the Referee determined that the reasonable value of the premises occupied by the Trustee was one-third of the rental reserved in the lease. To this figure were added certain minor expenses which are not now disputed, resulting in a finding that the Trustee's administrative rent liability was the sum of \$806. On review, the District Judge affirmed.

A determination by a Referee in Bankruptcy of reasonable rental value clearly is a finding of fact. As such, it is not subject to reversal unless clearly erroneous, particularly where the finding is approved on review by the District Judge.

General Order in Bankruptcy No. 47;

See, *e.g.*, *Hudson v. Wylie*, 242 F. 2d 435, 450 (C. A. 9, 1957).

On the present appeal, appellant is faced with a further difficulty arising from its decision not to bring to this Court the transcript of the proceedings before the Referee in Bankruptcy on January 11, 1962, when the matter of administrative rent was tried. This gap in the record alone should make it impossible for a reviewing court to conclude that a finding of fact was clearly erroneous.

But regardless of the foregoing, appellee-Trustee submits that the record here amply supports the ruling below, and that the Order appealed from is correct beyond doubt.

2. The Referee Correctly Concluded That There Was No Summary Jurisdiction to Award Judgment in Favor of Appellant and Against Appellee—Union Bank.

Appellee-Trustee, of course, is not financially involved with the question of whether the Referee should have granted judgment against appellee-Union Bank for the value of the portion of the premises which it occupied. It should be pointed out, however, that the settled rules of summary jurisdiction would preclude such an award where, as here, a timely objection was asserted. Insofar as the Bank is concerned, appellant's effort is to obtain an *in personam* judgment for money due. It is not an *in rem* proceeding to establish rights in property in the bankruptcy court's actual or constructive possession, nor has there been consent or submission to jurisdiction by the adverse party. Thus, there is no possible basis for summary jurisdiction. See, generally, 2 Collier on Bankruptcy, pp. 467 *et seq.* That, as appellant argues, it would be more convenient or tidy to have the Referee dispose of the entire controversy, rather than relegating the landlord to his suit against the Bank in the state court, cannot overcome this problem of lack of fundamental power.

Conclusion.

For the foregoing reasons, the Order of the Honorable William M. Byrne, United States District Judge, dated May 22, 1962, affirming the Order of the Referee in Bankruptcy, should be affirmed.

Respectfully submitted,

QUITTNER, STUTMAN & TREISTER,
By GEORGE M. TREISTER,
Attorneys for Appellee-Trustee in Bankruptcy.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE M. TREISTER

